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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1014

ARTHUR MEISTER AND DOROTHY MEISTER,
Petitioners,

v

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1974.

No.

ARTHUR MEISTER AND DOROTHY MEISTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Arthur and Dorothy Meister petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on October 16, 1974.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Third Circuit (1b-17b),[1] is reported at 504 F. 2d 505, and the opinion of the United States Tax Court (19b-33b), is reported at 60 T. C. 286 (1973).

1. References herein to "b" pages are to pages in the appendix attached to this petition. References to "a" pages are to pages in the printed appendix in the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 16, 1974. On January 14, 1975, Mr. Justice Brennan ordered that petitioner's time for filing a petition for a writ of certiorari be extended to and including February 13, 1975.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Do not the Fourth and Fifth Amendments bar the use by the federal government in a suit for tax delinquencies and penalties of testimonial materials unlawfully seized from the taxpayer even though the seizure was made by an employee of the taxpayer when (a) the employee's sole purpose in making the seizure was to aid in the enforcement of the federal revenue laws, (b) the federal government had, by publicly offering rewards for information leading to the recoupment of taxes, solicited searches and seizures by private individuals such as that carried out, clearly unlawfully, in this case, and (c) the taxpayer had taken every reasonable precaution to preserve the privacy of these personal records?

2. Does not this Court's decision in **Simmons v. United States**, 390 U. S. 377 (1968), preclude the federal government from relying on an assertion of ownership of stolen business records—made by the taxpayer solely for the purpose of a motion for the return and suppression of these papers—to establish the taxpayer's ownership of these papers in a suit for tax delinquencies and penalties?

CONSTITUTIONAL PROVISIONS, STATUTE AND TREASURY REGULATION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Fifth Amendment to the Constitution of the United States provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

Section 7623 of the Internal Revenue Code of 1954 provides:

> Sec. 7623. Expenses of Detection and Punishment of Frauds
>
> The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

Treasury Regulation § 301.7623-1(a) provides:[2]

> *In general.* A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same. The rewards provided by Section 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

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2. Treasury Regulation § 301.7623-1 is reproduced in full at 36b-38b.

STATEMENT.

This petition raises the question of whether the constitutional rights of every taxpayer are not jeopardized by the Internal Revenue Service's practice of publicly offering rewards to informers as an incentive for their procurement —whether by lawful or unlawful means—of information which can be used by the government to recoup taxes and recover penalties.

Specifically, it seeks review of a decision of the United States Court of Appeals for the Third Circuit affirming a decision of the United States Tax Court which held petitioner liable for tax deficiencies and penalties on the basis of personal business records of his individual proprietorship unlawfully seized from petitioner by an employee whose sole purpose in making the seizure was to aid in the enforcement of the federal revenue laws. Moreover, although the seizure had been made for the benefit of the federal government in the context of that government's reward system, the courts below held that the unlawful seizure of petitioner's papers by his employee somehow removed these papers from the "reasonable expectation of privacy" so that petitioner could assert neither his Fourth nor his Fifth Amendment rights with respect to the use of these papers against him in evidence.

This petition raises the further question whether, despite this Court's decision in **Simmons v. United States**, 390 U. S. 377 (1968), the federal government may rely upon the taxpayer's assertion of ownership of the stolen documents solely to establish his standing at a suppression hearing as an admission of that ownership which may be relied upon by the government as a crucial element of its case in chief for tax deficiencies and penalties.

The Facts of the Case.

Petitioner Arthur Meister ("Meister") [3] was, during the years in issue, the sole proprietor of Steelcraft Fluorescent and Stamping Company ("Steelcraft"), under which name he manufactured and sold fluorescent lighting fixtures (504 F. 2d at 506, 2b-3b).

Morris Abend ("Abend") was the Office Manager and Comptroller of Steelcraft. He was hired shortly after World War II and worked for Steelcraft to the time of his death on February 4, 1965 (504 F. 2d at 507, 3b). Abend was responsible for maintaining Steelcraft's books and records, as well as overseeing its general office operations (51a, 58a, 59a, 63a). Meister's federal income tax returns were prepared, not by Abend, but by a certified public accountant, Herman Broder (504 F. 2d at 506-507, 3b).

Meister had established a strict company policy that all bookkeeping functions were to be performed on Steelcraft's premises (52a, 54a, 79a, 81a). The current year's books and records were kept in a safe located on the premises, and prior years' records were stored elsewhere on the premises (504 F. 2d at 507, 3b). Abend's practice was to remove the current books from the safe each morning, either to make the entries himself or to supervise his assistant, Anna Shabses, in making the entries on the company premises, and then to return the books to the safe at the end of the day (53a, 58-59a, 80-81a).

In December, 1964, while vacationing in Florida, Abend sought out and met with agents of the Internal Revenue Service ("IRS") in Miami. A memorandum (Exhibit T-B, 233a) detailing the government's version of that meeting was prepared by one of the agents. A copy of this Memo-

3. Petitioners Arthur and Dorothy Meister are husband and wife. Dorothy Meister is a party to this action solely by virtue of having filed joint returns with her husband for the years involved (504 F. 2d at 506, 3b).

randum was forwarded to the IRS office in Newark, New Jersey, and agents working out of that office conducted the investigation which led to the issuance of statutory notices of deficiency (60 T. C. at 289, 22b).

According to the Memorandum, Abend informed IRS that he had documents, as well as personal workpapers made from his employer's records, which he claimed would show that Meister had been omitting income from his tax returns. Abend declared that he had retained evidence from the start with the intention of eventually turning it over to IRS when he was in a position to leave the firm, as he then was contemplating doing (233a-235a). However, Abend refused to turn over any documents at that time (235a), nor, as far as the record shows, did he ever turn over any such documents.

On February 15, 1965, a special agent from the Newark office went to Abend's home and was informed by Mrs. Abend that her husband had died on February 4 (504 F. 2d at 507, 3b-4b). Although Mrs. Abend had no knowledge of any information or records which her husband might have possessed, agents returned to the Abend home on three separate occasions and, after extensive searches, removed voluminous quantities of papers comprised of Abend's workpapers and what purported to be copies of Steelcraft records including bound volumes of carbons of a large number of Steelcraft invoices (504 F. 2d at 507, 4b). The Tax Court found, and the court below accepted as fact that, with the exception of the workpapers, all of the documents had been assembled and removed from Steelcraft's offices without Meister's authorization or consent (504 F. 2d at 507, 4b; 60 T. C. at 290, 23b).

On May 22, 1967, Meister filed an action in the United States District Court for the District of New Jersey, alleging the unlawful seizure of his papers and moving the court

for their return and suppression as evidence in any case against him. The court found it unnecessary to rule on the first part of the motion because, following out-of-court identification of Meister's papers by his accountant and brother-in-law, Herman Broder, the IRS voluntarily turned them over to Meister (34b-35b).[4] The court denied without prejudice the motion to suppress which it held premature in the absence of any pending civil or criminal proceeding (*id.*).

The government made copies of all the papers taken by the agents from the Abend home before returning the originals of the stolen papers to Meister (504 F. 2d at 507, 4b). It has conceded that these materials were absolutely essential to the development of its case, and that the notices of deficiency were based upon the seized documents or leads developed therefrom (60 T. C. at 291, 25b-26b, 119a-120a).

The Decision of the United States Tax Court.

The Tax Court found Meister liable for the full amount of the deficiencies plus penalties assessed against him by the government for the years 1960 through 1964, in total $377,185.02. With respect to the years 1960 through 1963, the court held that the government had sustained its burden of showing that the returns were false and fraudulent and filed with the intent to evade tax as provided in Section 6501(c) of the Code, which showing was necessary to overcome the three year statute of limitations provided for in Section 6501(a). With respect to the year 1964, the court sustained the government's finding of deficiency on the grounds that Meister had failed to sustain his burden of

4. While the record of this proceeding was not before the courts below, both relied on testimony regarding this proceeding in holding certain documents seized from Meister admissible as "business records."

showing the alleged deficiency to be erroneous (60 T. C. at 291, 25b).

The Tax Court, having previously denied Meister's pre-trial motion to quash the statutory notices of deficiency as being based on evidence obtained in violation of his Fourth and Fifth Amendment rights, again rejected the argument that the evidence "admittedly crucial" to the government's case was fatally tainted and should be excluded (60 T. C. at 292-293, 26b-27b). Relying on **Couch v. United States**, 409 U. S. 322 (1973), the court held there had been no violation of Meister's Fifth Amendment rights since the records had not been forceably taken by the government from Meister, but obtained by agents from the home of a third party, Mrs. Abend, who had voluntarily permitted the entry and seizure (60 T. C. at 292-293, 27b-29b). That those papers had been wrongfully seized in the first instance by Abend was held to be no bar to admissibility under **Burdeau v. McDowell**, 256 U. S. 465 (1921) (60 T. C. at 293, 29b).

The Decision of the Court of Appeals.

In affirming the decision of the Tax Court, the Court of Appeals held that **Burdeau** precluded objections, on either Fourth or Fifth Amendment grounds, to the use of evidence unlawfully taken by a private individual (504 F. 2d at 508-509, 7 b). The court purported to address the argument that such private seizures were solicited by the "informers" provision and hence, imputable to the government; however, it summarily dismissed the argument on the largely unresponsive grounds that Abend acted without government knowledge (504 F. 2d at 510, 10b).

The court likewise saw no merit in Meister's claimed Fifth Amendment privilege, but read **Couch** as negating the argument that Meister's "constructive possession" of the

papers was not destroyed by their theft (509 F. 2d at 511, 11b).

Finally, the court rejected the argument that bound volumes of invoices which were taken from the Abend home and which purported to be Steelcraft records were never properly identified or authenticated. Without denying that such identification was necessary to overcome a hearsay objection, the court found this condition satisfied by testimony of a revenue agent that Herman Broder, Meister's accountant and brother-in-law, had "identified" these papers as Meister's in order to press Meister's motion to suppress in the New Jersey Court. Under these circumstances, the court concluded it was "unrealistic" to allege that the invoices were not properly identified for admission under the "business records exception" to the hearsay rule (504 F. 2d at 512-513, 15b-16b).

REASONS FOR GRANTING THE WRIT.

1. The court below rejected petitioner's argument that the penalties and deficiencies assessed against him were based on evidence obtained in violation of his Fourth and Fifth Amendment rights in that the seizure of his personal business papers by an employee was made solely for use in the enforcement of the federal revenue laws, in the context of a publicly announced federal policy of rewarding informers in cases where their information led to the recoupment of taxes.

(a) The court below held that its decision was controlled by **Burdeau v. McDowell**, 256 U. S. 465 (1921), in which this Court held that there was no violation of Burdeau's rights under the Fourth Amendment, hence, no reason to apply the rule of exclusion announced in **Weeks v. United States**, 232 U. S. 383 (1914), where evidence had been unlawfully seized by a private individual unconnected with the government. The court made no reference to this Court's later decision in **Gambino v. United States**, 275 U. S. 310 (1927), to the effect that the Fourth Amendment does require suppression of evidence unlawfully seized ". . . by persons other than Federal officers . . .," 275 U. S. at 317, if the seizure was ". . . solely for the purpose of aiding the United States in the enforcement of its laws . . ." *ibid.*[5]

The distinction between **Burdeau** and **Gambino** is rooted in the purposes of the exclusionary rule. A proper regard for those cases demands that the exclusionary rule be applied to the present case, despite a contrary holding of the court below.

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5. Although the evidence in **Gambino** was seized by state police rather than civilians, this distinction was immaterial to decisions in the federal courts before this Court's decision in **Mapp v. Ohio**, 367 U. S. 643 (1961) overruled **Wolf v. Colorado**, 338 U. S. 25 (1949).

When this Court in **Weeks v. United States**, 232 U. S. 383 (1914), rejected the common law rule that any competent evidence could be used against an accused and held that evidence seized in violation of an accused's Fourth Amendment rights must be excluded in criminal trials, it had two basic reasons. The Court held that unconstitutional conduct "should find no sanction in the judgments of the courts which are charged at all times with the support of the constitution." 232 U. S. at 392. But first and most important, it held that the guarantee against unreasonable searches and seizures "might as well be stricken from the Constitution" if the deterrent effect of an exclusionary rule were not available to enforce it. *ibid.*

These dual purposes of deterring misconduct and of preserving the integrity of the judicial system have been repeatedly recognized by this Court. *See, e.g.*, **Elkins v. United States**, 364 U. S. 206 (1960); **McNabb v. United States**, 318 U. S. 332 (1943). And when, in **Mapp v. Ohio**, 367 U. S. 643 (1961), the Court extended the exclusionary rule to the states, the integrity of whose judicial systems was primarily a matter for local supervision, the Court made clear that it did so because in the 47 years since **Weeks**, no other method had been found equally effective in enforcing constitutional guarantees and deterring violations of them.

Plainly, neither of these purposes would have been served by applying the exclusionary rule to the facts in **Burdeau**. The unlawful search in that case had been conducted on behalf of an employer in an attempt to unravel the fraudulent business practices for which Burdeau had been fired and revealed incriminating personal papers of Burdeau. The employer later turned these papers over to the government which attempted to use them to obtain an indictment from a grand jury. It was clear, however, that

the employer had no thought of federal prosecution in mind when he conducted the search and that he would have acted as he did for his own business purposes without regard to criminal prosecution. Under these circumstances, deterrence could not have been achieved by application of the exclusionary rule to the facts in **Burdeau**. Equally, the **Burdeau** facts [6] did not pose a threat to the integrity of the courts in the admission of the unlawfully seized evidence since that evidence had not been seized for the benefit of the government or for use in the courts.

In **Gambino**, by contrast, the unlawfully seized evidence was properly excluded because its introduction would have frustrated both of the purposes of the exclusionary rule. The only reason that state officers seized the unlawfully imported liquor from Gambino was to permit the federal government to conduct a criminal prosecution, there being no state law violated by the possession or importation of that liquor. Accordingly, the exclusion of the evidence would have deterred similar seizures by frustrating their purpose. On the other hand, the acceptance of the illegally seized evidence in **Gambino** would have reflected on the integrity of the federal courts because, the seizure having been made for purposes of a federal prosecution, it would have shown that those courts were prepared to see the constitution evaded by subterfuge.

Thus, while **Burdeau** stands for the principle that the exclusionary rule does not prevent the government from utilizing evidence unlawfully seized by private parties acting purely for their own personal purposes, **Gambino**

6. **Burdeau**, a grand jury case, may even be an unarticulated product of the rule that evidence inadmissible at trials may be used before grand juries, *see* **Holt v. United States**, 218 U. S. 245 (1910), and **Costello v. United States**, 350 U. S. 359 (1956), which culminated in this Court's refusal in **United States v. Calandra**, 414 U. S. 338 (1974), to extend the exclusionary rule to grand jury proceedings.

requires application of the rule when, as in the present case, the government accepts the benefits of acts of persons, other than federal officials, intent on carrying out federal governmental purposes, particularly when, as is discussed in the next section of this petition, the government has encouraged the unlawful conduct by instituting a public system of rewards for informers.

The distance between **Burdeau** and **Gambino** has been narrowed by half a century of development of the exclusionary rule through the experience in ways by which ostensibly non-federal action may be touched with governmental purpose. Thus, even before the landmark decision in **Elkins v. United States**, 364 U. S. 206 (1960), that evidence illegally seized by state officials could never be used in federal prosecutions, this Court applied the exclusionary rule to bar the use of state-seized evidence when a federal officer accompanied state police in executing an invalid state warrant, **Byars v. United States**, 273 U. S. 28 (1927), and when a federal official arrived after the completion of a search by local police but participated in the selection of evidence to be seized. **Lustig v. United States**, 338 U. S. 74 (1949). Federal courts have similarly applied the exclusionary rule to bar the use of evidence illegally seized by private persons at the request of federal officials. **Corngold v. United States**, 367 F. 2d 1 (9th Cir. 1966) (en banc) (search by airline employee at request of Customs Agents); **Smith v. Rhay**, 419 F. 2d 160, 162-163 (9th Cir. 1969) (search by parole officer at request of police). As this Court noted in **Byars**, *supra*, 273 U. S. at 33-34, "[the Constitutional protection against unreasonable searches and seizures] . . . is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

Thus, the only question open to the Court of Appeals for the Third Circuit in this case was—putting aside for the moment the fact that the government was engaged in publicly offering rewards for informers in tax cases—whether an unauthorized seizure by a private citizen solely for the purpose of providing the federal government with evidence for use in prosecuting a tax-evasion case is, nevertheless, so unconnected with the government as to bring this case within the **Burdeau** rather than the **Gambino** rule.

In holding that **Burdeau** controlled and the evidence was properly admitted, the court not only failed to cite this Court's opinion in **Gambino**; it also refused to follow a well-reasoned holding of the Court of Appeals for the Seventh Circuit directly on point. That court, in **Knoll Associates, Inc. v. FTC**, 397 F. 2d 530 (7th Cir. 1968), had found the exclusionary rule applicable to a case in which a disgruntled employee of Knoll's exclusive sales agent in Detroit had made contact with the Federal Trade Commission and advised that he was in possession of papers which could be used against Knoll in a proceeding then being undertaken by the FTC. About one month later, the employee turned over to the FTC a large number of documents upon which the FTC relied heavily in issuing a cease and desist order. On a petition challenging the issuance of this order, the court held that the FTC's conduct in utilizing the fruits of the employee's theft violated Knoll's Fourth Amendment rights. The court stated, 397 F. 2d at 533-534:

> . . . The undisputed evidence shows that Prosser stole the documents for the purpose of assisting the Commission counsel in the prosecution of the proceeding then pending, and the record shows that the Commission by its use of the documents knowingly gave its approval to Prosser's unlawful act. We agree with

petitioner that the use of the stolen documents renders the Commission's order unenforceable.[7]

According to the government's own version of Abend's initial interview with IRS agents in Miami, Abend himself stated that he had, from the start, retained evidence for the purpose of turning it over to the government (233a). Moreover, IRS must have known even at that time that the Steelcraft documents were stolen since the memorandum of the first meeting carefully distinguished the "workpapers" as being Abend's own property (234a-235a). Thus, the decision below is in clear conflict with the determination in **Knoll** on substantially identical facts. This conflict between circuits in itself requires the intervention of this Court to clarify the principles announced half a century ago in **Burdeau** and **Gambino**.

(b) The fact is that the government was far more deeply involved in this case than it was in **Knoll**. It was not the innocent recipient of information procured as a result of unlawful conduct which it had neither induced nor could have foreseen. On the contrary, by its publicly-announced policy of rewarding informers for information leading to the successful recoupment of taxes, the government, in effect, solicited the unlawful search. While the

7. The Seventh Circuit's subsequent decision in **United States v. Harper**, 458 F. 2d 891 (7th Cir. 1971), *cert. denied* 406 U. S. 930 (1972), which was cited by the court below (504 F. 2d at 510, 11b), does not undermine, but in fact, reaffirms the basis for decision in **Knoll**. The court found no wrongful action imputable to the government in **Harper** where defendant's bookkeeper, in leaving her employ, had retained her copies of gross receipts records and turned them over to the government only upon request many months thereafter. In other words, she had appropriated the papers with no intent or purpose to assist the government and her conduct, if in fact unlawful, was carried out purely in a private capacity. 458 F. 2d at 893-894, *quoting* **N. L. R. B. v. South Bay Daily Breeze**, 415 F. 2d 360, 363 (9th Cir. 1969).

government may not have known that Abend would steal documents from his employer, the government relied on the probability that some employee in Abend's position would inform on his employer, and the government could foresee that such an employee might well resort to unlawful means in order to produce information which would qualify for a reward. *See, e.g.*, Comment, "Police Bulletins and Private Searches," 119 U. Pa. L. Rev. 163, 167, 170 (1970).

Section 7623 of the Internal Revenue Code of 1954 authorizes the payment of such sums, limited by the amounts appropriated, as the Secretary "may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws . . ." Treasury Regulation § 301.7623-1 which authorizes the payment of rewards derives authority from this statutory provision for the necessary expenses of enforcing the revenue laws. Thus, the payment of a reward is not an incidental means of gathering information, but an institutionalized mechanism—duly accommodated in the agency's budget—for enforcing the revenue laws. There can be no purpose for the Regulation except to create the expectation that information will be rewarded and to induce action based on that expectation.

It is in terms of the informer statute that the deterrent effect of the exclusionary rule becomes most meaningful and the error of the court below most apparent. For, if this Court has found that an exclusionary rule is necessary to deter from unlawful seizures federal and state officers whose actions are subject to the control and discipline of prosecuting attorneys learned in the law and whose training could be expected to make them cognizant of the constitutional rights of the suspects whose possessions they might seize, how much more is it needed with respect to the casual informer who lacks both training and supervision. In addi-

tion, the motivation of the informer to go beyond constitutional bounds to aid the government is far greater than that of a law officer: the officer will receive his salary whether or not he is successful in seizing evidence vital to any particular investigation; the informer will get his reward only if the government is able to gather sufficient evidence to collect additional taxes, penalties or fines. Treasury Regulation § 301.7623-1(c), 37b.

Under these circumstances, it is the federal courts, and only the courts, that are in a position to prevent informers from committing crimes on the government's behalf and with its encouragement. The criminality of informers, as much as that of wiretappers, is "dirty business," and the Constitution "does not permit the judge to allow such inequities to succeed." **Olmstead v. United States**, 277 U. S. 438, 469, 470 (1928) (Holmes, J., dissenting).

The courts have recognized in other contexts that the offer of such a contingent reward is an open invitation to private misconduct properly imputed to the government, and have taken corrective action. In **Williamson v. United States**, 311 F. 2d 441 (5th Cir. 1962), the court found *prima facie* evidence of governmental wrongdoing in the hiring of an informer on a contingent fee basis, quite apart from whether or not the informer had actually entrapped the defendant as alleged. The court held that, absent affirmative efforts on the part of the government to assure that proper procedures would be followed, the inducement to unlawful conduct inherent in the contingent fee arrangement was too great to be tolerated. 311 F. 2d at 444.[8]

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8. Significantly, Judge Cameron, dissenting in **Williamson**, noted that the contingent fee arrangement condemned there was essentially the same as that promulgated under Section 7623. He noted, 311 F. 2d at 446:

> . . . It is common knowledge that, based upon that statute, those charged with the responsibility of collecting

The Court of Appeals for the First Circuit looked directly at the relationship created by the informers statute in **Wheeler v. United States**, 351 F. 2d 946 (1st Cir. 1965). There, it found reversible error in the fact that the defense had not been permitted to question the government's chief witness regarding his claim for a reward. The court held such evidence crucial to the defense since after such cross-examination "[the informer] would then appear to the jury as a witness with a financial stake in having Wheeler convicted rather than as a citizen duty-bound to give incriminating testimony against a former employer." 351 F. 2d at 947.

Wheeler involved the informer-witness's financial stake in the outcome of the case; this case involves the source of that stake. For the calculated policy of the federal government of rewarding informers in tax cases makes those informers the *de facto* agents of the federal government, and that government should be held responsible for the conduct of those who respond to its offers of rewards. The Fourth Amendment was never meant to permit the federal government to hire amateur spies and informers to conduct searches and seizures its professional agents are constitutionally forbidden to undertake.

(c) Where, as in this case, evidence contemplated by the informer statute and unlawfully seized in furtherance of a governmental purpose is testimonial in nature, both the Fourth and Fifth Amendments bar its introduction into evidence.[9] For it is an unquestioned principle of law

8. (Cont'd.)

the government revenues make it a practice of rewarding contingently, individuals who "squeal" on those from whom sums are collected through information furnished by the "squealer."

9. The following Note of the Advisory Committee on the 1972 Amendments to Rule 41 of the Federal Rules of Criminal Procedure makes clear that the demise of the "mere evidence"

that the Fifth Amendment "privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life." **Bellis v. United States,** 417 U. S. 85, 87-89 (1974). Yet the court below held that Abend, in stealing petitioner's personal business records for the benefit of the government, not only did not violate Meister's Fourth Amendment rights, but successfully extinguished his Fifth Amendment rights as well.

The record establishes that Meister took every reasonable precaution to keep his business records on his busi-

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9. (Cont'd.)

rule in **Warden v. Hayden,** 387 U. S. 294 (1967), was not intended to relegate Fifth Amendment rights to the incidental protection afforded by the Fourth Amendment.

> There is no intention to limit the protection of the fifth amendment against compulsory self-incrimination, so items which are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds. *Schmerber v. California,* 384 U. S. 757 (1966). The Court referred to the possible fifth amendment limitation in *Warden v. Hayden, supra*:
>
> > This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure. [387 U. S. at 303] . . .
>
> It seems preferable to allow the fifth amendment limitation to develop as cases arise rather than attempt to articulate the constitutional doctrine as part of the rule itself.

The Seventh Circuit in **Hill v. Philpott,** 445 F. 2d 144, 149 (1971), *cert. denied* 404 U. S. 991 (1971), held that where a taxpayer could not be compelled to produce his records in answer to a summons, the Fifth Amendment similarly barred their being seized pursuant to an otherwise lawful search warrant. Although it finally declined to follow **Hill** in holding personal tax records inherently beyond the reach of a search warrant, the Ninth Circuit very recently held in **Vonder Ahe v. Howland,** 74-2 U. S. T. C. ¶ 9825, 85-702-03 (No. 71-1982, 11/7/74) (Opinion at 73-1 U. S. T. C. ¶ 9333 withdrawn), that although such records may be lawfully seized under the Fourth Amendment, their use in evidence against the victim of the search may still be contested on Fifth Amendment grounds.

ness premises and under his control; he had every expectation that these records would remain private. This expectation of privacy is the basis of both Fourth and Fifth Amendment rights. *See* **Couch v. United States,** 409 U. S. 322, 335-36 (1973); **Katz v. United States,** 389 U. S. 347 (1967). Yet it is upon **Couch** that the court below relied to negate petitioner's Fifth Amendment claim on the ground that **Couch** does not extend the privilege to one not in possession of the testimonial materials. However, in **Couch** this Court plainly recognized that the right to assert a Fifth Amendment claim goes with constructive as well as actual possession.

In evaluating the claim of "constructive possession" in **Couch,** this Court focused on the taxpayer's lack of "legitimate expectations of privacy," and stressed the following facts: (1) the taxpayer voluntarily divested herself of possession of her business and tax records, turning them over regularly to an accountant who held them in "continuous possession;" (2) the accountant neither worked in the taxpayer's office nor as her employee, but was an independent contractor who "actually did 'very little work for the petitioner,' had many other clients, and was compensated by the job;" and (3) the records were turned over to an accountant charged with a legal duty to make mandatory disclosures in preparing income tax returns. 409 U. S. at 334, 335. Under these circumstances, this Court held that taxpayer could not claim to have "an expectation of protected privacy or confidentiality." 409 U. S. at 336.

The Fifth Circuit, in **United States v. Kasmir,** 499 F. 2d 444, 453 (1974), *cert. granted,* 43 U. S. L. W. 3416 (Jan. 27, 1975), held the presence of a legitimate expectation of privacy determinative in establishing whether or not there was constructive possession which would preserve the Fifth Amendment privilege. Although the tax-

payer in that case had received papers from his accountant and had held them only long enough to transfer them to his attorney before a summons could be served, the court held that the taxpayer had not lost his privilege to prevent use of those papers against him. It distinguished **Couch** in that the taxpayer's legitimate expectations of privacy with regard to the use of those papers by his attorney "should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns." 499 F. 2d at 453.

In the instant case, Meister took great pains to insure a legitimate expectation that his personal papers would remain private and confidential: (1) Meister voluntarily entrusted Abend only with temporary possession of his records under a strict rule that all records were to be retained on Steelcraft premises and books were never to leave the office (504 F. 2d at 507, 3b; 52a, 54a, 79a, 81a); (2) Abend was Meister's full-time employee, unquestionably not an independent contractor (504 F. 2d at 507, 3b); and (3) Abend's bookkeeping functions did not include preparation of income tax returns (504 F. 2d at 506-507, 3b), his only duty with respect to these records being to his employer.

Abend remained Meister's employee until the time of his death, and at no time was he authorized or empowered to deliver documents to third parties or in any other way to waive Meister's Fifth Amendment rights. In stressing the importance of the accountant's independent status in **Couch**, this Court quoted the concession of the government at oral argument that an employee (such as Abend) could not waive a taxpayer's privilege against self-incrimination, 409 U. S. at n. 18, p. 334:

> In the Internal Revenue Service practice, so long as the taxpayer has retained possession of the records

> and they are being used only by his full-time employees or others on the taxpayer's premises, without the taxpayer having relinquished possession and control of the records, we ordinarily in those situations issue the summons to the taxpayer, because it is the taxpayer who has the dominion over the records and the authority to return the summons. And if the taxpayer chooses to plead the privilege against self-incrimination, that is up to the taxpayer.

Similarly, in the context of consensual searches, the IRS has, again, recognized that "[a]n employee has no authority to waive the constitutional rights of his employer unless he is authorized to act as an agent for his employer." Internal Revenue Manual Chapter 9900, Handbook for Special Agents § 283.82 (11/15/72) (CCH, Dec. 5, 1974).

The federal government simply cannot recognize that an individual proprietor has a reasonable expectation of privacy with respect to his papers in the hands of his employees—requiring that revenue agents seek business records from the employer and not his employees—and at the same time rely on a system of informer rewards that encourages the same employees to betray the privacy of their employers.

2. The government's insistence that the papers it recovered from Abend's widow were Meister's own records gives Meister standing to raise the constitutional argument that these records were unlawfully seized by Abend from Meister on behalf of the federal government. But, in order for the government to introduce those records into evidence in the Tax Court as Meister's, some witness was required to identify these records as belonging to Meister. Yet no one did so; Abend was dead and his widow disclaimed any knowledge of the records (see 60 T. C. at 289, 22b).

Counsel for Meister objected to the admission of this evidence in the Tax Court, and argued in the court below that the unidentified invoices constituted inadmissible hearsay evidence since no proper foundation had been laid which would bring them within the business records exception to the hearsay rule.[10] In holding the conditions of admissibility satisfied, the court below relied on testimony of Special Agent Miller that Broder, Meister's accountant and brother-in-law, "identified" the invoices as Steelcraft records in the New Jersey district court action for recovery and suppression pursuant to which "all of Steelcraft's records held by the IRS were turned over to Steelcraft" (504 F. 2d at 512-513, 15b-16b). Clearly the court did not rely on Broder's identification *per se*,[11] but rather relied on

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10. Such a factual foundation has been held to be required under the business records exception, the so-called "shop book" rule of 28 U. S. C. § 1732 (1966). *See* **Cahn v. Nicholas**, 408 F. 2d 1 (5th Cir. 1969), where tax returns, worksheets, books and records were excluded under this rule for lack of proper authentication, even though they were found in the taxpayer's business office. Rule 803(6) of the newly approved Federal Rules of Evidence explicitly requires this foundation to be "shown by the testimony of the custodian or other qualified witness."

11. Broder was hardly in a position to qualify or authenticate the invoices within the intendment of 28 U. S. C. § 1732, since he neither prepared the invoices, nor was a custodian of Steelcraft records.

Moreover, since Broder did not testify in the instant action regarding his identification, the truth of his identification could not be determined by the court apart from its legal consequences in the New Jersey action. Counsel for Meister moved to strike the whole of Agent Miller's testimony (170a, 176a), and specifically protested that the facts concerning the New Jersey proceeding were not in the record (175a). This motion was denied (176a).

In fact, the record of the New Jersey proceeding shows that the court made no order based on Broder's identification, but relied on IRS' voluntary return of the property allegedly belonging to Meister (34b-35b).

the fact that he acted as an agent for Meister in making an identification at the suppression hearing.

In effect then, the lower court compelled Meister to be a witness against himself in a matter crucial to the government's case against him by drawing admissions of fact from a legal position which Meister had been forced to assume in order to assert his constitutional rights under the Fourth Amendment. Such a compelled surrender of one constitutional right in order to assert another, squarely contradicts this Court's holding, on legally indistinguishable facts, in **Simmons v. United States**, 390 U. S. 377 (1968).

In **Simmons**, prior to trial the defendant in a robbery case had moved unsuccessfully to suppress admission of a suitcase containing money wrappers taken from the victimized bank. Since he was neither the owner of the premises from which the suitcase was seized, nor present at the time of the seizure, he could gain standing to press his Fourth Amendment claim only by giving testimony as to ownership of the suitcase. This testimony was then introduced at the trial on the merits to link the defendant to the highly incriminating evidence. Justice Harlan, speaking for the Court, found that an "undeniable tension" is created where testimony given to obtain the benefit of one constitutional right is presumed a voluntary waiver of another. He continued, 390 U. S. at 394:

> . . . Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment

grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.

The instant case, of course, involves precisely the **Simmons** situation. In order to move for the suppression and return of the stolen documents, Meister was forced to stipulate ownership, which "admission" was relied upon by the court below to authenticate otherwise inadmissible documents crucial to the case against him. While **Simmons** involved a criminal prosecution, the rationale for decision in that case did not turn on circumstances peculiar to a criminal case, but rather on the constitutional rights involved. Since the protections of both the Fourth [12] and Fifth [13] Amendments have been held to be available to the

12. The United States Tax Court has very recently held, in an exhaustive opinion, that the exclusionary rule should be applied in a civil tax fraud proceeding such as this one. **Suarez v. Commissioner,** 58 T. C. 792 (1972) (citing cases). This Court has held Fourth Amendment standards applicable to administrative searches in **Camara v. Municipal Court,** 387 U. S. 523 (1967), and **See v. City of Seattle,** 387 U. S. 541 (1967), and has held that the exclusionary rule properly applies in forfeiture proceedings, **One 1958 Plymouth Sedan v. Pennsylvania,** 380 U. S. 693 (1965). Indeed in establishing the exclusionary rule in **Weeks,** this Court defined the scope of Fourth Amendment protection to reach "all alike, whether accused of a crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." 232 U. S. at 392.

The lower courts have likewise applied the exclusionary rule in a variety of non-criminal contexts, *see* **Powell v. Zuchert,** 366 F. 2d 634 (D. C. Cir. 1966) (action challenging discharge of government employee); **Knoll Associates,** *supra;* **Iowa v. Union Asphalt & Roadoils, Inc.,** 281 F. Supp. 391, 406-409 (S. D. Iowa 1968), *aff'd sub nom.* **Standard Oil Company v. Iowa,** 408 F. 2d 1171 (8th Cir. 1969) (civil antitrust action).

13. It is equally well-established that, notwithstanding the apparent limitation of the Fifth Amendment to criminal proceedings, evidence obtained in violation of an individual's privilege against self-incrimination may not be used against him in a civil tax fraud proceeding. **Romanelli v. Commissioner,** 466

civil defendant, it would be anomalous indeed if the protection provided in **Simmons** against the compelled election between these constitutional rights were denied that same defendant, particularly in a prosecution for tax fraud which involves substantial penalties predicated on conduct that would establish a criminal violation.

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13. (Cont'd.)
F. 2d 872 (7th Cir. 1972), *rev'g.* 54 T. C. 1448 (1970); *see also* **United States v. United States Coin and Currency in the Amount of $8674.00,** 393 F. 2d 499 (7th Cir. 1968), *aff'd* 401 U. S. 715 (1971).

Similarly, it is clear that documents such as those stolen by Abend from Steelcraft's offices are encompassed within the scope of the privilege against self-incrimination. *See* **Bellis v. United States,** *supra;* **Boyd v. United States,** 116 U. S. 616 (1886). In fact, while Professor Wigmore takes a narrow view of the scope of Fifth Amendment privilege, he has stressed that the forced production of documents offends the Fifth Amendment precisely because, as here, the owner must, himself, attest to their trustworthiness. 8 Wigmore, Evidence §§ 2264, p. 379 (McNaughton Rev. 1961).

CONCLUSION.

For the reasons hereinbefore set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 13, 1975.

Appendix.

COURT OF APPEALS OPINION.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1851 and 73-1852

ARTHUR MEISTER AND DOROTHY MEISTER,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

APPEAL FROM THE UNITED STATES TAX COURT

Argued May 30, 1974

Before KALODNER, ROSENN and HUNTER, *Circuit Judges*

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Opinion of the Court.

(Filed October 16, 1974)

KALODNER, *Circuit Judge.*

The primary question presented is whether the Tax Court erred in rejecting the appellant-taxpayers' contention that critical documentary evidence in the instant civil tax proceeding was inadmissible because it was obtained in violation of their Fourth and Fifth Amendment rights in that it had been wrongfully taken from them by their bookkeeper and later allegedly illegally "seized" by the Government in a search of the then deceased bookkeeper's home where they were found.

A second question presented is whether the Tax Court erred in admitting into evidence the bookkeeper's "workpapers" over the "hearsay" objection of the appellants.

The facts as found by the Tax Court in its reviewed opinion at 60 T. C. 286 (1973) are as follows:

The appellant-taxpayers, Arthur Meister and Dorothy Meister are husband and wife. They filed joint income tax returns for the years 1960-1964, inclusive, here involved. Included in these returns was the income derived from the Steelcraft Fluorescent & Stamping Co. ("Steelcraft"), of

which Arthur Meister ("Meister")[1] was sole proprietor. Steelcraft engaged in the manufacture and sale of fluorescent lighting fixtures.

Meister maintained a set of books and records in connection with his operation of Steelcraft. They included cash receipts for check transactions, cash transactions, cash disbursements, general ledger, general journal, accounts receivable, accounts payable, sales journal, and special sales journal.

Steelcraft's books and records were set up and examined at regular intervals by one Herman Broder, Meister's brother-in-law, a certified public accountant. Broder made office audits of the books and records. He prepared Meister's federal income tax returns and in the course of doing so prepared schedules showing the income and expenses of Steelcraft as reflected by its books and records.

Morris Abend was office manager and comptroller of Steelcraft from right after World War II to the date of his death on February 4, 1965. Current records were kept by him in a small safe at Steelcraft. Prior years' records were stored on the premises.

On December 17, 1964, while on vacation in Florida, Abend contacted the Internal Revenue Service ("I. R. S.") in Miami, and, in the course of an interview with a representative of the Intelligence Division, disclosed information relating to Meister's income tax returns. As a result of this interview, Special Agent Dale Gardner of the I. R. S. office in Newark, New Jersey was assigned in February of 1965 to investigate allegations made by Abend.

On February 15, 1965, Gardner and another agent called at the Abend home seeking additional information.

1. The appellants Arthur Meister and Dorothy Meister are husband and wife. Dorothy Meister is a party to this proceeding by virtue of the fact that she filed joint income tax returns with her husband for the taxable years involved.

They were told by Mrs. Abend that her husband had died on February 4, 1965. The agents decided not to pursue the matter further at that time since Mrs. Abend was still distraught over the loss of her husband.

The agents returned on March 11, 1965 and discussed the purpose of their visit with Mrs. Abend, showing her an account of the interview between Abend and the Florida I. R. S. agent. Mrs. Abend had no knowledge of any information which her husband might have possessed. She consented to the agents' search of a cupboard in which Abend had kept various workpapers and other business records. The agents found and removed two brown manila envelopes containing sheets of columnar workpapers on which Abend had purportedly transcribed records of Steelcraft relating to its sales and cash receipts.

Gardner returned to the Abend home on March 15, 1965, when he obtained from Mrs. Abend a shopping bag containing what purported to be Steelcraft sales invoices. On March 24, 1965, Gardner and a fellow agent made a final visit to the Abend home. They then obtained voluminous bundles of records including cancelled checks and bound volumes of Steelcraft invoices.

No summons or subpoena was ever issued to Mrs. Abend calling for her production of the papers obtained from the Abend home. However, she at no time objected to either the search or the removal of these papers from her some. In resume, the material removed from Mrs. Abend's home consisted of (1) Abend's *workpapers* which purportedly transcribed Steelcraft's sales cash receipts; and (2) *actual* records of Steelcraft, viz., invoices, cancelled checks and other documents, which had been wrongfully removed by Abend from Steelcraft's offices.

Internal Revenue Service agents made copies of *all* the material removed from the Abend home. The records which had been wrongfully removed by Abend from the

Steelcraft offices were ultimately returned to Steelcraft pursuant to a court order in a proceeding instituted by Meister for their recovery in the United States District Court for the District of New Jersey.

The copies made of the removed material were utilized by the Government in checking the Steelcraft sales and receipts which they reflected against the sales as reflected in Meister's income tax returns for 1960-1963. Verification of the former was sought by contacting the customers of Steelcraft during the years involved.

In the interim, on October 8, 1965, Gardner delivered a statutory notice of reexamination of Meister's tax returns for 1960-1963, inclusive, with a request for the reproduction of Meister's books and records for those years. No books or records were ever provided in response to this request.

The Tax Court found that Meister "[d]uring the taxable years 1960 to 1963, inclusive, . . . negotiated checks received in payment of certain specific accounts and obtained cash either in the full amount of the check or for part of the check in the form of a so-called 'split deposit,'" and that "the cash thus received was not reflected in either sales or income of Steelcraft as reported in the petitioner's [Meister's] Federal income tax returns for the taxable years 1960 to 1963, inclusive."

The Tax Court further found that Meister's Federal income tax returns for the years 1960 through 1963 were "false and fraudulent with intent to avoid tax" in that they "omitted from sales and income" the sum of $57,361.13 for the year 1960; $93,684.95 for the year 1961; $79,043.27 for the year 1962; and $90,774.49 for the year 1963.

It also found that Meister omitted sales and income in the sum of $101,648.13 in his income tax return for the taxable year 1964 and that the resulting underpayment of tax was due to negligent or intentional disregard.

In sustaining the Commissioner's deficiency determinations, plus penalties, in the aggregate sum of $377,185.02, the Tax Court held in its Opinion that the Commissioner had met the burden of proof imposed upon him to establish that Meister had deliberately failed to report sales and income for the taxable years 1960 through 1963,[2] and that insofar as the taxable year 1964 was concerned, Meister had failed to present any evidence that the Commissioner's determination as to that year was erroneous in disregard of Meister's burden of proof.

Meister here contends that the Tax Court erred in admitting into evidence copies of Steelcraft documents purloined by Abend and Abend's workpapers. He says that his Fourth Amendment rights were violated when Abend wrongfully removed the documents and again when the Internal Revenue Service agents "seized such documents without legal process from his employee's home after his death," and that his Fifth Amendment right against self-incrimination was violated when the Steelcraft documents were admitted into evidence. Meister further contends that the Steelcraft documents and Abend's workpapers were erroneously admitted into evidence under the business records exemption to the hearsay rule.

The essence of Meister's Fourth Amendment contention is that (1) Abend's purloining of the Steelcraft documents "can be imputed to the Government" because it was allegedly in consequence of Treasury Regulations providing for payment of an informer's fee; and (2) Meister was and continued to be the owner of the purloined documents and thus their removal from the Abend home without a search

2. The Commissioner had this burden because the statute of limitations with respect to taxable years 1960 through 1963 would have run unless he demonstrated that each of the Meisters' returns for those years was a "false and fraudulent return with the intent to evade tax" within the meaning of Section 6501(c)(1) Internal Revenue Code of 1954 (26 U. S. C.).

and seizure warrant was unlawful, albeit Mrs. Abend acquiesced in their removal. The essence of Meister's Fifth Amendment contention is that the purloined documents "are encompassed within the scope of the privilege against self-incrimination."

We agree with the Tax Court's holding that Meister's Fourth and Fifth Amendment rights were not violated in the admission into evidence of the purloined documents for these reasons:

It was settled in the landmark case of *Burdeau v. McDowell*, 256 U. S. 465 (1921) that the Government may retain for use against their owner in a criminal proceeding incriminating documents which were stolen by private individuals, without governmental knowledge or complicity, and turned over to the Government.

Burdeau specifically held that (1) the Fourth Amendment proscription against unreasonable search and seizure applies only to *governmental* action, and thus it is not contravened by independent actions of individuals, conducted without governmental knowledge; and (2) the Fifth Amendment does not preclude use in a criminal prosecution of incriminating papers wrongfully taken from their owner by private individuals without Government knowledge or participation. In so holding, the Court said in relevant part:

> "The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, *its protection applies to governmental action.*
>
> "*. . . It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable search and seizure, as whatever wrong was done was the act of individuals in taking the property of another.*

> *"The Fifth Amendment, as its terms import is intended to secure the citizen from compulsory testimony against himself.* It protects from extorted confessions, or examinations in court proceedings by compulsory methods." 256 U. S. at 475. (Emphasis supplied.)
>
> . . . .
>
> "We know of no constitutional principle which requires the Government to surrender the papers under such circumstances. *Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.*
>
> "The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, *we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.*" 256 U. S. at 476. (Emphasis supplied.)

In *United States v. Goldberg*, 330 F. 2d 30, *cert. denied*, 377 U. S. 953 (1964), a case substantially similar to the instant case, we cited and applied the *Burdeau* principle that the Fourth Amendment restrains only "governmental action." In *Goldberg*, three employees took records belonging to their employer and turned those records over to the Government. The Government used those records

in prosecuting Goldberg for numerous counts of tax evasion. In upholding the admission into evidence of the stolen records, we noted that "the Government had no part or knowledge that [the employees] were going to take the records [that the employees] turned over." 330 F. 2d at 35. Accordingly, we held that "the documents and records were clearly admissible under Burdeau v. McDowell." *Id.* As an alternative basis for our holding, we stated that "*additionally,* the records were not personal records of the appellant, but belonged to the various corporations concerned and since they were, the appellant had no basis on which to object to their admission." *Id.* (Emphasis supplied.)

The appellants urge that *Goldberg* is distinguishable because of its alternative holding, *viz.,* that the records involved were corporate and not personal. In doing so they disregarded our critical holding that the documents there concerned "were clearly admissible" under *Burdeau,* because of the absence of "governmental action."

The *Burdeau* doctrine has been given effect in the cases cited in the margin.[3]

The vitality of *Burdeau* is attested to by its recent citation and application in *Couch v. United States,* 409 U. S. 322, 331-32 n. 14 (1973).

Burdeau's holding that the Fourth Amendment's protection "applies to governmental action" was recently

3. *See, e.g.,* United States v. McGuire, 381 F. 2d 306, 313 n. 5 (2d Cir. 1967), *cert. denied,* 389 U. S. 1053 (1968) (dictum); United States v. Valen, 479 F. 2d 467, 469 (3d Cir. 1973); United States v. Jones, 457 F. 2d 697, 699 (5th Cir. 1972); United States v. Winbush, 428 F. 2d 357, 358-59 (6th Cir.), *cert. denied,* 400 U. S. 918 (1970); United States v. Harper, 458 F. 2d 891, 893-94 (7th Cir. 1971), *cert. denied,* 406 U. S. 930 (1972); United States v. Echols, 477 F. 2d 37, 39 (8th Cir.), *cert. denied,* 414 U. S. 825 (1973); Eisentrager v. Hocker, 450 F. 2d 490, 492 (9th Cir. 1971); United States v. Harding, 475 F. 2d 480, 483-84 (10th Cir. 1973).

re-affirmed in *United States v. Calandra*, 414 U. S. 338 (1974) in this statement at page 354:

> "The purpose of the Fourth Amendment is to prevent unreasonable *governmental intrusions* into the privacy of one's person, home, papers, or effects. The wrong condemned is the unjustified *governmental invasion* of these areas of an individual's life." (Emphasis supplied.)

Meister's contention that Abend's purloining of the Steelcraft documents "can be imputed to the Government" because it was allegedly in consequence of Treasury Regulations providing for payment of an informer's fee is utterly without merit since the record clearly establishes that Abend acted without the Government's knowledge.

Meister's further contention that the Government's removal of the Steelcraft records from the Abend home without a search and seizure warrant violated his Fourth Amendment rights is likewise without merit.

The record discloses that Mrs. Abend acquiesced in the search for, and removal of, the records. It is well-settled that the Fourth Amendment is not violated where a warrantless search "is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U. S. 218 (1973.)

In *Schneckloth* it was said at pages 231-232:

> "Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions."

It may be noted parenthetically that we recently cited and applied *Schneckloth* in *Government of the Virgin Islands v. Gereau, et al.*, — F. 2d — (decided August 15, 1974).

Burdeau's specific holding that the Fifth Amendment is not contravened by use in a criminal proceeding of incriminating documents stolen from their owner by private individuals, without governmental knowledge or complicity, effectively disposes of Meister's contention that his Fifth Amendment rights were violated in the instant case because he continued to be in "constructive possession" of the purloined documents and thus they could not be used to incriminate him.

As earlier noted, we applied *Burdeau* in *Goldberg*, where records taken by employees were used in the taxpayer's trial for income tax evasion.

Burdeau and *Goldberg* were cited and followed in *United States v. Harper,* 458 F. 2d 891, 893-94 (7th Cir. 1971), *cert. denied,* 406 U. S. 930 (1972), where records of the defendant were obtained by an employee without governmental knowledge or complicity.

Harper specifically rejected the contention, made here, that the vitality of *Burdeau* has been impaired by *Elkins v. United States,* 364 U. S. 206 (1960). The Second and Ninth Circuits have similarly held that *Elkins* has not impaired the vitality of *Burdeau: United States v. McGuire,* 381 F. 2d 306, 313-314 n. 5 (2d Cir. 1967), *cert. denied,* 389 U. S. 1053 (1968); *N. L. R. B. v. South Bay Daily Breeze,* 415 F. 2d 360, 363 (9th Cir. 1969), *cert. denied,* 397 U. S. 915 (1970).

McGuire and *South Bay Daily Breeze* held that *Burdeau* precluded claims that records wrongfully taken by private individuals, without Government knowledge or complicity, violated the Fourth Amendment privilege.

Couch v. United States, supra, negates Meister's contention that his "constructive possession" of the purloined documents operated to prevent their use as evidence by virtue of the Fifth Amendment proscription against self-incrimination.

Couch stressed that the Fifth Amendment is a "personal privilege" which "adheres basically to the person," and "not to information that may incriminate him."

In so holding the Court said in relevant part:

> "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: 'A party is privileged from producing the evidence but not from its production.' *Johnson v. United States,* 228 U. S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness 'against himself'; it necessarily does not proscribe incriminating statements elicited from another. Compulsion upon the person asserting it is an important element of the privilege, and 'prohibition of compelling a man . . . to be witness against himself is a prohibition of the use of physical or moral compulsion to extort commmunications from *him,' Holt v. United States,* 218 U. S. 245, 252-253 (1910) (emphasis added). It is extortion of information from the accused himself that offends our sense of justice." 409 U. S. at 328.

While we do not reach the question whether the Fourth and Fifth Amendment privileges inure to a civil proceeding for the collection of taxes in light of the fact that we do not here find a violation of these Amendments, it is pertinent to note with respect to Meister's Fifth Amendment claim that when his instant action came to trial in February 1972 he was immune from criminal prosecution for fraudulent evasion of income tax in 1960-1963 by reason of the running of the six-year statute of limitation.[4]

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4. 26 U. S. C. A. § 6531.

In consonance with what has been said we are of the opinion that neither the Fourth nor Fifth Amendments precluded the Tax Court's admission into evidence of the Steelcraft documents wrongfully removed by Abend and later removed by revenue agents from Mrs. Abend's home with her acquiescence. To hold otherwise would be to disregard the square holding in *Burdeau* that the Fourth and Fifth Amendments do not preclude use in a criminal prosecution of incriminating documents wrongfully taken from their owner without Government knowledge or participation.

United States v. Kasmir, decided by the Fifth Circuit on August 23, 1974, and other cases cited by Meister in support of his "constructive possession" theory are inapposite on their facts.

There remains for disposition Meister's further contention that the Tax Court erred in admitting into evidence Abend's "workpapers" over Meister's "hearsay" objection.

Meister urges that Abend's workpapers and the copies of the bound volumes of invoices, were inadmissible hearsay, and that the Commissioner's summaries of these invoices, being based on inadmissible hearsay, were likewise inadmissible. He contends that "the only exception" to the hearsay rule "which might possibly apply" to permit the introduction of the workpapers and the bound volumes of invoices "is the business records exception," and that the necessary foundation for the introduction of this evidence as a business record under 28 U. S. C. A. § 1732(a), *i.e.,* that the memorandum or record was "made in the regular course of business" and that "it was the regular course of business to make such a memorandum or record" contemporaneously,[5] was not laid.

5. See Rivers v. Union Carbide Corp., 426 F. 2d 633, 637 (3d Cir. 1970).

We initially note that Meister's hearsay objection is irrelevant insofar as it relates to the deficiency determination for the 1964 tax year, inasmuch as the burden of proof for that year rested on Meister to show that the Commissioner's deficiency determination was incorrect or arbitrary.[6]

The Commissioner says that Meister's hearsay objection as to the Abend workpapers "does not warrant reversal" since the workpapers were not necessary to prove the income omissions for the 1960-1963 tax years and, consequently, were "merely cumulative" evidence. We agree with the Commissioner's description of Abend's workpapers as "merely cumulative" evidence. There was ample evidence, apart from the workpapers, to sustain the Commissioner's burden of proving fraud for the 1960-1963 tax years, inclusive, based on a comparison of a copy of Steelcraft's accounts receivable record for 1960, copies of Steelcraft's bound invoices covering 1961-1963, and copies of cancelled checks payable to Steelcraft, with the testimony and records of Steelcraft's customers. Thus, assuming *arguendo* that the workpapers were inadmissible hearsay, reversal is not called for under these facts. *See Masterson v. Pennsylvania R. Co.*, 182 F. 2d 793, 797-98 (3d Cir. 1950).

We do not subscribe to Meister's hearsay challenge with respect to the copies of the bound volumes of purportedly Steelcraft invoices.[7]

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6. See former Rule 32, Tax Court Rules of Practice, Estate of Mazonni v. Commissioner, *supra*, note 1.

7. We have grave doubts whether the hearsay objection on this point was appropriately raised below. When the invoices were first introduced into evidence, no objection was made by Meister's counsel. At a later point in the trial, when an I. R. S. agent testified that the invoices were obtained from the Abend home and not from Meister's place of business, Meister's counsel stated: "Based on this testimony, I move to strike all of those cartons of records [referring to the invoices] as not admissible, *not competent*." (emphasis supplied).

We note that this hearsay objection has no impact at all on the Commissioner's burden of proof for the 1960 tax year since in lieu of presenting invoices for that year, the Commissioner presented a copy of what purported to be Steelcraft's 1960 accounts receivable ledger, a document found and removed from Abend's home. No objection was raised to this document, other than Meister's "blanket objection" on Fourth and Fifth Amendment grounds to all material obtained from the Abend home.

The hard core of Meister's position is that the copies of the bound Steelcraft invoices were not properly authenticated at the trial so as to permit their introduction into evidence under 28 U. S. C. A. § 1732(a), the "business records exception" to the hearsay rule. Meister says that "the bound invoices are hearsay and are not admissible under the business records exception because no one identified them as business records of Steelcraft." The short answer to this contention is that it is just not so. An I. R. S. agent testified that Broder, Meister's accountant and brother-in-law, "identified" the invoices "as their [Steelcraft's] records" in Meister's independent court action to recover the records in the District Court for the District of New Jersey. Pursuant to this court proceeding, all of Steelcraft's records held by the I. R. S. were turned over to Steelcraft.[8] The record in the instant case

8. The testimony was as follows:

"Q. Mr. Miller [the I. R. S. agent], were you present in response to Petitioners' court action that required the production of certain records of Steelcratf?

"A. Yes.

. . . .

"Q. In response to this, were any records turned over to Steelcraft, to the Petitioners?

"A. Oh, yes.

"Q. What records were included in those that were turned over to the Petitioners at this time?

"A. I believe all records, except two or three boxes.

discloses no contention on the part of Meister that the returned records are not Steelcraft records.[9] In light of these circumstances, we are of the view that it is unrealistic to contend that the "business records exception" to the hearsay rule could not be invoked because the necessary foundation was lacking. *See Carroll v. United States*, 326 F. 2d 72, 77-78 (9th Cir. 1963); *Stillman v. United States*, 177 F. 2d 607, 618 (9th Cir. 1949).

Since the invoices were admissible under the "business records exception," the summaries of those invoices were likewise admissible. Summaries of voluminous business records are admissible in evidence where the records are already in evidence, permitting independent verification of the summaries. *See, e.g., United States v. Smallwood*, 443 F. 2d 535, 539-40 (8th Cir.), *cert. denied*, 404 U. S. 853 (1971); *McDaniel v. United States*, 343 F. 2d 785, 789 (5th Cir.), *cert. denied*, 382 U. S. 826 (1965); *Fairchild Stratos Corporation v. Lear Siegler, Inc.*, 337 F. 2d 785,

8. (Cont'd.)

"Q. I point particularly were the original copies that you made photostatic copies of the invoices included in those that were turned over?

"A. Yes.

"Q. Why were they turned over to the Petitioners?

"A. Because they were identified as their records. Mr. Broder identified them as their records, and the Court ordered anything they identified as Steelcraft's was to be turned over to them.

"Q. In other words, copies of the invoices that you made copies of yesterday were identified as the records of Steelcraft by Mr. Broder?

"A. In effect, yes."

9. We note that the I. R. S. "verified" the invoices by comparing the total sales figures reached by totalling the invoices for the relevant tax years with the sales as reported on Meister's income tax returns. The differences, reasonably reconciled by other factors, *e.g.*, differing discounts to customers, were minimal. Further verification was sought by contacting Steelcraft customers for the relevant tax years and comparing figures on the customers' own records covering dealings with Steelcraft.

794-95 (4th Cir. 1964); *United States v. Goldberg*, 330 F. 2d 30, 43 (3d Cir.), *cert. denied*, 377 U. S. 953 (1964); *cf.* 4 Wigmore, Evidence § 1230 (1972).

The foregoing establishes that Meister's "hearsay" objections are without merit.

For all of the reasons stated the decisions of the Tax Court will be affirmed.

.....

United States Circuit Judge

COURT OF APPEALS JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 73-1851/73-1852.

ARTHUR MEISTER AND DOROTHY MEISTER,
Appellants

v.

COMMISSIONER OF INTERNAL REVENUE

(Tax Court Docket Nos. 3756-68 and 5317-70.)

ON APPEAL FROM A DECISION OF THE
UNITED STATES TAX COURT.

Present: KALODNER, ROSENN and HUNTER, *Circuit Judges.*

Judgment.

These causes came on to be heard on the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decisions of the said Tax Court in these causes be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:

THOMAS P. QUINN,
Clerk.

October 16, 1974.

UNITED STATES TAX COURT OPINION.

ARTHUR MEISTER AND DOROTHY MEISTER,
PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

Docket Nos. 3756–68, 5317–70.

Filed May 23, 1973.

Jerome R. Miller and *Walter D. LeVine*, for the petitioners.

Robert N. Ginsberg, John J. Hopkins, and *Barry N. Mosebach*, for the respondent.

QUEALY, *Judge:* The respondent determined deficiencies in income taxes and additions thereto due from petitioners as follows:

Year	Deficiency	Penalty	
		Sec. 6653(a)	Sec. 6653(b)
1960	$32,742.03	.....	$16,809.70
1961	59,543.26	.....	30,196.33
1962	49,971.23	.....	25,496.65
1963	58,749.60	.....	29,918.29
1964	70,245.65	$3,512.28	.....
	271,251.77	3,512.28	102,420.97

The principal issue for decision is whether certain evidence obtained by the respondent with respect to the tax liability of petitioners for the years 1960 to 1964, inclusive, resulted from an illegal search and seizure on the part of respondent and is, therefore, inadmissible, as having been obtained in violation of the petitioners' rights as guaranteed by the fourth and fifth amendments of the Constitution.

Respondent concedes that the examination which resulted in the issuance of notices of deficiency in this case was predicated upon such evidence.

On the other hand, if such evidence was not obtained in violation of any rights of petitioners, it then becomes incumbent upon the Court to determine whether respondent has sustained the burden of proof that petitioners' returns for the taxable years 1960 to 1963 were false and fraudulent within the meaning of section 6653(b).[1] If so, in the absence of any proof on the part of petitioner to show the correct amount of the tax due for said years, the respondent's determination must be sustained. In the absence of proof of fraud by the respondent for the taxable years 1960 to 1963, inclusive, the assessment of any additional tax is barred by the statute of limitations.

With respect to the taxable year 1964, the petitioner presented no proof to show either that respondent's determination of deficiency or the addition to the tax with respect thereto was erroneous. In the absence of such proof, the respondent's determination, including the assessment of the addition to the tax under section 6653(a), must be sustained.

Some of the facts have been stipulated and, to the extent set forth herein, are found accordingly. Other facts relating to various deposits by petitioner with financial institutions, which were deemed to have been stipulated pursuant to Rule 31(*b*)(5) of the rules of this Court over the objection of petitioner, have been disregarded as having no probative value.

Findings of Fact.

The petitioners, Arthur Meister and Dorothy Meister, are husband and wife, who, at the time of the filing of the petition in docket No. 3756–68, resided in Newark, N. J. At

1. All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

the time the petition was filed in docket No. 5317–70, petitioners resided in East Orange, N. J.

Petitioners filed joint, individual income tax returns for the taxable years 1960, 1961, 1962, 1963, and 1964. The returns for each year were timely filed within the period granted by extension of time pursuant to petitioner's request.

At all times here involved, Arthur Meister (hereinafter termed petitioner) [2] conducted business as a sole proprietor in Newark, N. J., trading as Steelcraft Fluorescent & Stamping Co. (hereinafter termed Steelcraft), engaged in the manufacture and sale of fluorescent lighting fixtures.

Petitioner maintained a set of books and records in connection with his conduct of the sole proprietorship and operation of the business known as Steelcraft. Such books maintained by said petitioner consisted of the following: Cash receipts for check transactions, cash transactions, cash disbursements, general ledger, general journal, accounts receivable, accounts payable, sales journal, and special sales journal. The books and records of Steelcraft were kept on the accrual basis of accounting.

The petitioner's books and records were set up and examined at regular intervals by Mr. Herman Broder, petitioner's brother-in-law, a certified public accountant. Mr. Broder advised the petitioner with respect to costs and prices, made office audits of the books and records, and prepared the Federal income tax returns of the petitioner. In the course of preparing such returns, Mr. Broder prepared schedules showing the income and expenses of Steelcraft as reflected by its books and records.

Morris Abend (hereinafter referred to as Abend) was office manager and comptroller of Steelcraft from right

2. Dorothy Meister is a party in this proceeding solely by virtue of having filed joint income tax returns with her husband in the years involved.

after World War II up to the date of his death in February 1965. Prior to Abend's death, the current records were kept by him in a small safe at Steelcraft. Prior years' records were stored on the premises.

On December 17, 1964, while vacationing in Florida, Abend contacted the Internal Revenue Service in Miami, Fla., and verbally transmitted to a representative of the Intelligence Division certain information with respect to the Federal income tax returns theretofore filed by the petitioner. A memorandum setting forth what transpired at that time was duly transmitted to the Intelligence Division of the Internal Revenue Service at Newark, N. J. As a result thereof, Special Agent Dale Gardner of the Newark office was assigned in February 1965 to investigate the allegations made by Abend.

On February 15, 1965, Special Agent Gardner accompanied by another agent called at the home of Abend for the purpose of obtaining additional information. They were informed by Mrs. Abend that her husband had died on February 4, 1965. Due to the fact that Mrs. Abend was still distraught on account of the death of her husband, Special Agent Gardner did not pursue the matter on the occasion of that visit.

On March 11, 1965, Special Agent Gardner and his associate made a second visit to the Abend home. They discussed with Mrs. Abend the purpose of their visit, showing her the account of the interview with her husband at Miami, Fla. Mrs. Abend had no knowledge of any information which might have been in the possession of her husband. With her consent, they thereupon searched a cupboard in which Abend kept workpapers and other business records. They discovered two brown manila envelopes containing sheets of columnar workpaper on which Abend had purportedly transcribed records of Steelcraft. Special

Agent Gardner removed this material from the Abend home.

On March 15, 1965, Special Agent Gardner and an associate made another visit to the Abend home in search of additional material. At this time, they obtained from Mrs. Abend a shopping bag containing what purported to be sales invoices of Steelcraft.

On March 24, 1965, Special Agent Gardner and an associate made a final visit to the Abend home. At this time, they obtained voluminous bundles of records including canceled checks and bound volumes of invoices purporting to represent transactions of Steelcraft. These records practically filled the trunk of the car.

At no time was any summons or subpoena issued to Mrs. Abend calling upon her to produce the records which were in the custody of her husband. No warnings were given to Mrs. Abend with respect to the possibility of self-incrimination. Mrs. Abend did not at any time object to the search and removal of these records by Special Agent Gardner and his associate. The material removed from Mrs. Abend's home included both transcripts presumably prepared by her husband on ledger sheets and purporting to be copies of records of Steelcraft, as well as invoices, canceled checks, and other documents which purported to be a part of the actual records of Steelcraft. This material had been assembled and removed by Abend from petitioner's place of business without the authorization or consent of petitioner.

Petitioner's returns for the taxable years 1960 to 1963, inclusive, had previously been examined by representatives of the Internal Revenue Service. As a result of said examinations, additional taxes had been assessed for each of said years and had been paid by the petitioners.

The agents of the respondent made copies of the records and other materials which had been removed from

the Abend home, some of which were ultimately returned to the petitioner pursuant to court order. Based upon such records, including workpapers prepared by Abend, the respondent then proceeded to reconcile the sales as reported in the returns of petitioners from the taxable years 1960 to 1963, inclusive, with the sales reflected on the petitioner's records. Verification of the latter was sought by contacting the customers of Steelcraft during the years in question.

As a result of the information obtained from the records which had been removed from the Abend home, Special Agent Gardner delivered to the petitioner under date of October 8, 1965, a statutory notice of reexamination of the returns of the petitioner for the taxable years 1960 to 1963, inclusive, with the request that the petitioner produce his books and records for the years involved herein. Neither the petitioners nor their representatives furnished any books or records to the respondent in response thereto.

During the taxable years 1960 to 1963, inclusive, the petitioner negotiated checks received in payment of certain specific accounts and obtained cash either in the full amount of the check or for part of the check in the form of a so-called "split deposit." The cash thus received was not reflected in either sales or income of Steelcraft as reported in the petitioner's Federal income tax returns for the taxable years 1960 to 1963, inclusive. Said accounts included the following:

Customer	Omissions from income			
	1960	1961	1962	1963
Kenbert-Arpag	$30,917.03	$40,070.14	$24,309.60	
Mercury Lighting	8,282.25	12,104.56	7,286.10	$8,578.22
La-Mar Lighting			11,266.12	1,242.60
Spillite		2,438.90		
Crownlite		0		2,657.25
Totals	39,199.28	54,613.60	42,861.82	12,478.57

In their Federal income tax return for the taxable year 1960, petitioners omitted from sales and income the sum of $57,361.13. A part of the resulting underpayment of tax was due to fraud within the meaning of section 6653(b). Said return was false and fraudulent with intent to avoid tax within the meaning of section 6501(c).

In their Federal income tax return for the taxable year 1961, petitioners omitted from sales and income the sum of $93,684.95. A part of the resulting underpayment of tax was due to fraud within the meaning of section 6653(b). Said return was false and fraudulent with intent to avoid tax within the meaning of section 6501(c).

In their Federal income tax return for the taxable year 1962, petitioners omitted from sales and income the sum of $79,043.27. A part of the resulting underpayment of tax was due to fraud within the meaning of section 6653(b). Said return was false and fraudulent with intent to avoid tax within the meaning of section 6501(c).

In their Federal income tax return for the taxable year 1963, petitioners omitted from sales and income the sum of $90,774.49. A part of the resulting underpayment of tax was due to fraud within the meaning of section 6653(b). Said return was false and fraudulent with intent to avoid tax within the meaning of section 6501(c).

In their Federal income tax return for the taxable year 1964, petitioners omitted from sales and income the sum of $101,648.13. The resulting underpayment of tax was due to negligence or intentional disregard of the rules and regulations within the meaning of section 6653(a).

OPINION.

In this case the respondent in substance concedes that the issuance of the notice of reexamination of the years 1960 to 1963, inclusive, pursuant to section 7605(b) and

the determination of deficiency with respect to those years, as well as the year 1964, were predicated upon certain information, including some records belonging to Steelcraft,[3] which came into the possession of the respondent as the result of a "search and seizure" of material then in the physical possession of Mrs. Abend, wife of the deceased bookkeeper. Petitioner contends that such records were obtained as the result of an illegal search and seizure within the meaning of the fourth amendment[4] and in violation of petitioner's privilege against self-incrimination protected by the fifth amendment.[5]

We are thus faced with the question whether the documentary evidence admittedly crucial to the respondent's case was obtained in violation of petitioner's rights under the fourth and fifth amendments, and, if so, whether such "tainted" evidence may be resorted to by the respondent in a civil proceeding before this Court.

At the outset we will assume that the investigation of the petitioner's income tax returns by the respondent was

3. Since Steelcraft was a sole proprietorship, we are not here concerned with the distinction between the individual records of a taxpayer and those of a corporate business.

4. The fourth amendment provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. The fifth amendment provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

undertaken with a view towards possible criminal prosecution. Respondent sent out two special agents whose primary function was to investigate criminal violations of the internal revenue laws. However, we find nothing in their actions which could be construed as an infringement of petitioner's constitutional rights under either the fourth or the fifth amendment. We need not, therefore, reconsider whether the fifth amendment may be relied upon to exclude evidence in a civil proceeding before this Court. See *John Harper,* 54 T. C. 1121 (1970); *Hugo Romanelli,* 54 T. C. 1448 (1970), reversed and remanded 466 F. 2d 872 (C. A. 7, 1972); also *Efrain T. Suarez,* 58 T. C. 792 (1972).

In the case before us, the petitioner was not called upon to produce anything. The evidence relied upon by the respondent was no longer in his possession either actively or constructively. It had been taken from his premises without his knowledge and had come into the possession of Mrs. Abend, a disinterested third party. The right of the respondent to rely upon and to utilize such evidence is established by the recent decision of the Supreme Court in *Couch v. United States,* 409 U. S. 322 (1973).

In the *Couch* case, the records of the taxpayer were in the custody of an accountant, not an employee of the taxpayer, who regularly prepared her income tax returns. The Internal Revenue Service sought to subpoena those records. The taxpayer intervened, seeking to invoke the privilege against self-incrimination. In denying the taxpayer's right to assert the privilege, the Supreme Court held that the protection against self-incrimination in the fifth amendment went to the person seeking to assert that privilege, and not to the evidence itself. Since the taxpayer had entrusted possession of her records to an accountant, the issuance of the summons to the accountant did

not constitute compulsion upon the taxpayer to do anything. The Supreme Court said:

> In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production. Inquisitorial pressure or coercion against a potentially accused person, compelling her, against her will, to utter self-condemning words or produce incriminating documents is absent. In the present case, no "shadow of testimonial compulsion upon or enforced communication by the accused" is involved. *Schmerber v. California*, 384 U. S. 757, 765 (1966).
>
> The divulgence of potentially incriminating evidence against petitioner is naturally unwelcomed. But petitioner's distress would be no less if the divulgence came not from her accountant but from some other third party with whom she was connected and who possessed substantially equivalent knowledge of her business affairs. The basic complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, not from the manner in which or the person from whom it was extracted. Yet such divulgence, where it did not coerce the accused herself, is a necessary part of the process of law enforcement and tax investigation.

Mrs. Abend must be regarded as a disinterested third party against whom no proceeding was ever pending or contemplated. She had no reason to request a summons to produce the material or to resist such a summons if

served upon her. Her action in voluntarily permitting the respondent's agents to come into her home and remove the material did not impinge upon any rights of the petitioner. *United States v. White,* 477 F. 2d 757 (C. A. 5, 1973). She had no interest in the matter and voluntarily permitted the respondent's agents to come into her home and remove the material in question. There is no analogy to the facts in *Efrain T. Suarez, supra,* relied on by petitioner, where the local authorities broke into the premises of the petitioner without a search warrant.

The petitioner contends that the records were wrongfully removed by Abend from the premises of Steelcraft, without authority and completely outside the scope of his employment. This would not constitute a bar to the admissibility of such records in this proceeding. *Burdeau v. McDowell,* 256 U. S. 465 (1921); *United States v. Goldberg,* 330 F. 2d 30 (C. A. 3, 1964), certiorari denied 377 U. S. 953 (1964).

Petitioner also contends that the notice of deficiency with respect to the years 1960 to 1963, inclusive, is defective in that the respondent failed to comply with the requirements of section 7605(b) in the issuance of the notice of reexamination.[6] Petitioner argues that such notice was issued *after,* and not *before,* the decision to reexamine petitioner's returns for those years.

If we look to the chronological sequence of events which preceded the issuance of the notice of reexamination, the facts belie this argument. Initially Abend contacted the Internal Revenue Service at Miami and stated that he had

6. Sec. 7605(b) provides:

(b) RESTRICTIONS ON EXAMINATION OF TAXPAYER.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

certain information relating to the income tax returns of the petitioner, showing the deliberate omission of sales and income from those returns, which he proposed to turn over to the Internal Revenue Service. In due course, a memorandum of this initial interview was forwarded to the Internal Revenue Service at Newark for further investigation. Upon attempting to contact Abend, the revenue agent to whom the matter had been assigned learned of Abend's death. Thereafter, the agents made several visits to Abend's home from which, without objection on the part of Mrs. Abend, they removed certain working papers and records.

Before formally initiating a reexamination of petitioner's returns, the respondent thereupon set about to analyze and to verify the allegations of the deceased informant. Being satisfied that there was reasonable cause, the respondent thereupon notified the petitioner of the reexamination of his returns in accordance with section 7605(b).

This Court can find nothing contrary to the statute in the procedure which was followed prior to the issuance of the notice of reexamination. In fact, failure to comply with the statute might well result if such notices were issued solely on the basis of an unsubstantiated statement by an informant. In this case, the respondent first made an effort to substantiate Abend's allegations. After an independent investigation, the respondent determined reasonable cause. After fully complying with the requirements of the statute, proper notice was thereupon served on the petitioner calling upon him to make available his records for purposes of the proposed reexamination of his returns. See *United States v. Powell*, 379 U. S. 48 (1964); *Hinchcliff v. Clarke*, 371 F. 2d 697 (C. A. 6, 1967).

With respect to the question whether petitioner, in fact, deliberately failed to report sales and income of Steelcraft

for the taxable years 1960 to 1963, inclusive, the respondent has the burden of proof. In meeting that burden, the respondent submitted evidence from which the Court has concluded that the petitioner omitted sales and income on account of the following customers:

Customer	Omissions from income			
	1960	1961	1962	1963
Kenbert-Arpag	$30,917.03	$40,070.14	$24,309.60	.....
Mercury Lighting	8,282.25	12,104.56	7,286.10	$8,578.22
La-Mar Lighting	.....	.....	11,266.12	1,242.60
Spillite	.....	2,438.90	.....	.....
Crownlite	.....	0	.....	2,657.75
Totals	39,199.28	54,613.60	42,861.82	12,478.57

In general, the evidence offered by the respondent entailed an analysis and comparison of the total purchases by said customers as reflected on their records with the total sales to said customers as reflected in the sales and income shown on the income tax returns of the petitioner for the years in question. Respondent then accounted for the difference by showing that some checks were either negotiated for cash in toto and not reflected in income on the books of Steelcraft, or negotiated in the form of a split deposit wherein a part of the total amount was received in cash and similarly not reflected in income on the books of Steelcraft.

While the proof offered by the respondent did not go to the entire amount which petitioner is alleged to have omitted from income in each of the years in question, and was admittedly based upon secondary evidence or copies of records where the originals no longer were available, the petitioner had ample opportunity to account for or to refute such evidence.

Instead of meeting the issue, the petitioner testified that he had no knowledge with respect to the books and

records of the business. He would have this Court believe that whatever was done was the work of Abend, the deceased bookkeeper. In light of the fact that Broder, the accountant, who was also petitioner's brother-in-law and subsequently became a partner in the business, regularly examined the financial records of Steelcraft, we find such testimony on the part of petitioner wholly lacking in credibility.

In addition, the petition contended that all of the books and records with respect to the years 1960 to 1963, inclusive, *and even the books and records with respect to the year 1964,* were taken from the premises of Steelcraft without his knowledge. Likewise, Broder testified that his working papers, which presumably would have been equally informative, disappeared with the records. It is implied that Abend took these records.

We find such testimony wholly lacking in credibility. In the first place, Broder must have had access to the books and records for the year 1964 when he prepared the schedules for petitioner's tax return for that year. Abend died on February 4, 1965. The Court finds it difficult to believe that Broder could have prepared the schedules for the 1964 tax return if Abend had removed those records from the premises from Steelcraft prior to his death. In addition, whatever records were in the possession of Abend at his death were surrendered to the Internal Revenue Service by Mrs. Abend. Those records were, in turn, turned over to the petitioner. Any records taken by Abend would have been recovered upon his death.

Considering the record as a whole, the conclusion is inescapable that the petitioner deliberately set about to understate sales and income for the taxable years 1960 to 1963, inclusive, and thereby to avoid the payment of tax thereon. The income tax returns filed by the petitioner for

those years were false and fraudulent with intent to evade tax. Since the petitioner has failed to submit any proof with respect to his correct tax liability for such years, the determination of the respondent is sustained both with respect to the deficiencies and with respect to the additions to the tax under section 6653(b).

With respect to the taxable year 1964, the petitioner has the burden of proof. With respect to such year, petitioner failed to present any evidence showing that the respondent's determination was erroneous. Accordingly, the determination of the respondent with respect to the deficiency and with respect to the addition to the tax under section 6653(a) is sustained.

Reviewed by the Court.

Decisions will be entered for the respondent.

DISTRICT COURT ORDER.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY.

Civil Action No. 1259-66.

ARTHUR MEISTER,

Plaintiff,

v.

UNITED STATES OF AMERICA, JOSEPH SHOTZ, District Director of Internal Revenue, and WILLIAM V. MILLER, Special Agent, and Their Respective Agents, Servants, Employees and Attorneys,

Defendants.

Order.

This matter being presented to the Court by Gutkin & Miller, Esqs., appearing by Sydney A. Gutkin, Esq. and Martin D. Moroney, Esq., attorneys for the plaintiff, and in the presence of David M. Satz, Jr., United States Attorney for the District of New Jersey, appearing by Vincent J. Commisa, First Assistant U. S. Attorney, attorneys for the defendants, and it appearing to the Court by the complaint and order to show cause filed herein that the plaintiff seeks: (1) the return of certain records in the possession of the defendants, and (2) an order enjoining and suppressing the use of said records in any criminal or civil proceeding regarding plaintiff's income tax liabilities; and it appearing to the Court that the defendants have moved

for a dismissal of the action, and it being represented to the Court by the defendants, that said defendants have since the institution of this action, returned all of plaintiff's records in their possession to said plaintiff; and the Court having considered the briefs submitted and the arguments of counsel, it is, on this 15th day of August, 1967,

ORDERED that the plaintiff's prayer to enjoin and suppress the use of the said records be, and it is hereby denied; provided, however, that such dismissal shall be without prejudice to renew the same in the event a criminal proceeding is commenced.

/s/ ROBERT SHAW,
U. S. D. C. Judge.

The undersigned hereby consent to the form of the within Order.

GUTKIN AND MILLER,

By /s/ SYDNEY A. GUTKIN,
Sydney A. Gutkin,
A Member of the Firm,
Of Counsel.

DAVID M. SATZ, JR.,
United States Attorney,
By /s/ VINCENT J. COMMISA.

TREASURY REGULATION.

§ 301.7623-1. REWARDS FOR INFORMATION RELATING TO VIOLATIONS OF INTERNAL REVENUE LAWS.—(a) *In general.* A district director may approve such reward as he deems suitable for information that leads to the detection and punishment of any person guilty of violating any internal revenue law, or conniving at the same. The rewards provided for by section 7623 are limited in their aggregate to the sum appropriated therefor and shall be paid only in cases not otherwise provided for by law.

(b) *Eligibility to file claim for reward*—(1) *In general.* Any person, other than certain present or former federal employees (see subparagraph (2) of this paragraph), who submits, in the manner set forth in paragraph (d) of this section, information relating to the violation of an internal revenue law is eligible to file a claim for reward under section 7623.

(2) *Federal employees.* No person who was an officer or employee of the Department of the Treasury at the time he came into possession of information relating to violations of the internal revenue laws, or at the time he divulged such information, shall be eligible for reward under section 7623 and this section. Any other federal employee, or former federal employee, is eligible to file a claim for reward if the information submitted came to his knowledge other than in the course of his official duties.

(3) *Deceased informants.* A claim for reward may be filed by an executor, administrator, or other legal representative on behalf of a deceased informant if, prior to his death, the informant was eligible to file a claim for such reward under section 7623 and this section. Certified

copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to such a claim for reward on behalf of a deceased informant in order to show the authority of the legal representative to file the claim for reward.

(c) *Amount and payment of reward.* All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, shall be taken into account by a district director in determining whether a reward shall be paid, and, if so, the amount thereof. The amount of a reward shall represent what the district director deems to be adequate compensation in the particular case, normally not to exceed ten percent of the additional taxes, penalties, and fines which are recovered as a result of the information. No reward, however, shall be paid with respect to any additional interest that may be collected. Payment of a reward will be made as promptly as the circumstances of the case permit, but generally not until the taxes, penalties, or fines involved have been collected. However, the informant may waive any claim for reward with respect to an uncollected portion of the taxes, penalties, or fines involved, in which case the claim may be immediately processed. No person is authorized under these regulations to make any offer, or promise, or otherwise to bind a district director with respect to the payment of any reward or the amount thereof.

(d) *Submission of information.* Persons desiring to claim rewards under the provisions of section 7623 and this section may submit information relating to violations of the internal revenue laws, in person, to the Office of the Director of the Intelligence Division, Washington 25, D. C., or to the office of a district director, preferably to a representative of the Intelligence Division thereof. Such

information may also be submitted in writing to the Commissioner of Internal Revenue, Attention: Director, Intelligence Division, Washington 25, D. C., or to any district director, Attention: Chief, Intelligence Division. If the information is submitted in person, either orally or in writing, the name and official title of the person to whom it is submitted and the date on which it is submitted must be included in the formal claim for reward.

(e) *Anonymity.* No unauthorized person shall be advised of the identity of an informant.

(f) *Filing claim for reward.* An informant who intends to claim a reward under section 7623 should notify the person to whom he submits his information of such intention, and must file a formal claim, signed with his true name, as soon after submission of the information as practicable. If other than the informant's true name was used in furnishing the information, the claimant must include with his claim satisfactory proof of his identity as that of the informant. Claim for reward under the provisions of section 7623 shall be made on Form 211, which may be obtained from the offices of the district directors, or from the Commissioner of Internal Revenue, Washington 25, D. C. A claim for reward should be transmitted to the district director, Attention: Informant's Claim Examiner, or to the Commissioner of Internal Revenue, Attention: Director, Intelligence Division, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1014

ARTHUR MEISTER AND DOROTHY MEISTER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented by the petition is whether documents belonging to petitioner,[1] which one of his employees had wrongfully taken from him without the knowledge of the government, are admissible against petitioner in a subsequent civil tax proceeding.

1. Petitioner was the sole proprietor of Steelcraft Fluorescent & Stamping Company, which was engaged in the manufacture and sale of fluorescent light fixtures. On December 17, 1964, Morris Abend, who was Steelcraft's office manager and comptroller, met with agents of the Internal Revenue Service and informed them that he possessed documentation which would show that petitioner had deliberately understated his income tax. Abend stated that he was prepared to turn over such documents to the government (Pet. App. 3b).

[1] "Petitioner" refers to Arthur Meister. His wife, Dorothy Meister, is a party solely because she filed joint income tax returns with him for the years at issue.

Pursuing this lead, the agents called at the Abend home on February 15, 1965. At that time, they were informed by Abend's wife that he had died on February 4, 1965. Because of Abend's recent death, the agents decided not to pursue the matter until a later date. They returned on March 11, 1965, and, after showing Mrs. Abend a memorandum of her husband's interview with them, informed her of the purpose of their visit. Mrs. Abend knew nothing of any records which her husband might have possessed, but she consented to the agents' search of a cupboard in which they found several columnar work sheets. These workpapers prepared by Abend purportedly contained his transcriptions of the records of Steelcraft relating to its sales and cash receipts (Pet. App. 2b-5b).

Further inquiries at the Abend home on March 15 and 24, 1965, resulted in the agents' obtaining voluminous bundles of records, including cancelled checks and bound volumes of Steelcraft invoices. Abend had wrongfully removed these records from the Steelcraft premises without the government's knowledge. These records were subsequently returned to Steelcraft pursuant to a court order in a proceeding instituted by petitioner for their recovery in the United States District Court for the District of New Jersey. In that proceeding, petitioner's accountant identified the invoices as Steelcraft's records (Pet. App. 2b-5b, 13b).

Ultimately, the Internal Revenue Service utilized copies of the documents taken from the Abend household, which consisted of Abend's own workpapers and Steelcraft's actual records, for the purpose of verifying the Steelcraft sales and receipts reported by petitioner on his income tax returns for the years 1960 through 1963. Further verification of the sales invoices obtained from the Abend household was obtained from Steelcraft customers by comparing the invoices with customer records (Pet. App. 5b, 14b).

As a result of this audit, the Commissioner of Internal Revenue determined deficiencies in petitioner's income taxes of $271,251.77 for the years 1960-1964, plus civil fraud penalties for the years 1960 through 1963 and a civil negligence penalty for the year 1964. The Tax Court upheld the Commissioner's determination, concluding that petitioner's tax returns for the 1960 through 1963 period were "false and fraudulent with intent to avoid tax" in their omission of the sums of $57,361.13, $93,684.95, $79,043.27 and $90,774.49, for the respective years 1960 through 1963. In addition, the Tax Court found that petitioner had omitted sales and income in the sum of $101,648.13 for 1964, and that this underpayment was due to negligence or intentional disregard of rules and regulations (Pet. App. 19b, 25b).

The court of appeals affirmed. It held that: (1) removal of the Steelcraft records from the Abend household did not violate any right of petitioner since Mrs. Abend had consented to the search of her premises and the removal of the records; (2) the government's utilization of the Steelcraft records in the civil tax case did not violate petitioner's constitutional rights because Abend's wrongful appropriation of the documents had occurred without the government's knowledge or complicity; and (3) the copies of Steelcraft invoices which were admitted into evidence to establish the understatement of income were properly authenticated, both by petitioner's accountant, and by comparison with sales reported on petitioner's tax returns, as well as with customer records (Pet. App. 6b-17b).

2. The court of appeals correctly recognized that this Court's decision in *Burdeau* v. *McDowell*, 256 U.S. 465, long ago established that evidence wrongfully taken by

private individuals without the knowledge or complicity of the government is admissible in a criminal prosecution of the owner of the stolen documents. In *Burdeau*, the Court held that the Fourth Amendment protection against "unlawful searches and seizures" extends only to "governmental action" and does not encompass "the act of individuals in taking the property of another" (256 U.S. at 475).[2] See also *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-488. These holdings apply *a fortiori* in the present non-criminal context.

The Court in *Burdeau* also rejected the claim that governmental utilization of records appropriated by private individuals would violate the owner's Fifth Amendment rights in a subsequent criminal proceeding. In so holding, the Court observed that the government would have been free to subpoena such documents from third parties in possession of the papers as long as it had had no hand in wrongfully obtaining the documents (see 256 U.S. at 476). As the Court recently reaffirmed in *Couch* v. *United States*, 409 U.S. 322, 328, the Fifth Amendment's prohibition of compelled self-incrimination "does not proscribe incriminating statements elicited from another. * * * It is extortion of information from the accused himself that offends our

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[2]The rule of *Burdeau* has been uniformly applied by the courts of appeals. See, *e.g.*, *United States* v. *McGuire*, 381 F.2d 306 (C.A. 2) (dictum), certiorari denied, 389 U.S. 1053; *United States* v. *Valen*, 479 F.2d 467 (C.A. 3); *United States* v. *Goldberg*, 330 F.2d 30 (C.A. 3), certiorari denied, 377 U.S. 953; *United States* v. *West*, 453 F.2d 1351 (C.A. 3); *United States* v. *Harper*, 458 F.2d 891 (C.A. 7), certiorari denied, 406 U.S. 930; *United States* v. *Echols*, 477 F.2d 37 (C.A. 8), certiorari denied, 414 U.S. 825; *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360 (C.A. 9), certiorari denied, 397 U.S. 915; *United States* v. *Ogden*, 485 F.2d 536 (C.A. 9); *United States* v. *Harding*, 475 F.2d 480 (C.A. 10); *United States* v. *Jones*, 457 F.2d 697 (C.A. 5). See also *People* v. *Horman*, 22 N.Y. 2d 378, 239 N.E. 2d 625, certiorari denied, 393 U.S. 1057, to the same effect.

sense of justice." In *Couch*, the Court relied on *Burdeau* to support its conclusion that possession of documents is required in order for the owner to raise a Fifth Amendment claim to bar their production; it specifically noted that "the Court in *Burdeau* failed to find any impermissible public compulsion on the owner absent his possession" (409 U.S. at 332, n. 14).

In any event, as the court of appeals noted (Pet. App. 12b), the admission of the documents against petitioner here could not have incriminated him because at the time of trial the six-year statute of limitations for criminal prosecution had expired for the years at issue.

3. Contrary to petitioner's argument (Pet. 14-16), *Knoll Associates, Inc.* v. *Federal Trade Commission*, 397 F.2d 530 (C.A. 7), does not conflict with the decision below. There, the court excluded evidence which had been illegally seized by an employee of the defendant corporation's sales representative for the purpose of assisting the government in a Clayton Act proceeding. Unlike the situation here, however, there was evidence of governmental complicity in *Knoll Associates*. Indeed, the Seventh Circuit in *Knoll Associates* specifically distinguished *Burdeau* by stating: "[T]he record [in Burdeau] * * * showed that no official of the government had anything to do with the seizure of petitioner's property or any knowledge thereof until months after it had been taken from him. * * * The facts in this case are the antithesis of those in *Burdeau*" (397 F.2d at (397 F.2d at 535-536, n. 5).

Moreover, the Seventh Circuit's adherence to *Burdeau* is demonstrated by its subsequent holding in *United States* v. *Harper*, 458 F.2d 891, certiorari denied, 406 U.S. 930. There an employee had taken her employer's records with-

out his permission and without the government's knowledge, and had thereafter turned the documents over to the government. On those facts, which closely parallel the present case, the Seventh Circuit upheld the government's use of the records in a criminal tax proceeding, pointing out that the employee had "obtained the records upon her own volition without any contact with or pressure from the government agents" (458 F.2d at 894). Accord, *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360, 363 (C.A. 9), certiorari denied, 397 U.S. 915.

4. The record does not support petitioner's further contention (Pet. 14-22) that Abend was acting in the capacity of a government agent, or that the government had any knowledge of, or complicity in, the original theft. Petitioner's attempt (Pet. 16-17) to ascribe a principal-agent relationship to the government and Abend on the basis of the reward accorded informers by 26 U.S.C. 7623, has no support in the evidence. Nothing in the record indicates that Abend was motivated to obtain the documents by the possibility of reward, or even that he intended to claim a reward for his conduct. See *Coolidge* v. *New Hampshire, supra,* 403 U.S. at 487-488.[3]

5. Finally, petitioner argues (Pet. 22-26) that the decision below is contrary to *Simmons* v. *United States*, 390 U.S. 377. There, a defendant in a criminal case had

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[3]The memorandum of the interview between Abend and the agents (R. 233a-236a) indicates that his motives in going to the authorities included the hope of receiving lenient treatment for his part in assisting petitioner to avoid taxes as well as anger at being compelled to participate in illegal tax evasion over a period of many years. Thus, *Gambino* v. *United States*, 275 U.S. 310, relied upon by petitioner (Pet. 13-15), is inapposite. There, the Court held that an illegal search and seizure made by New York state police solely for the purpose of assisting the federal government violated the Fourth and Fifth Amendments. ("R." refers to the record appendix in the court of appeals.)

unsuccessfully sought to suppress evidence on the basis of a Fourth Amendment claim. However, at the "suppression" hearing he was compelled to acknowledge that the evidence belonged to him, and this testimony was admitted at trial. In reversing his conviction, this Court held that it was improper to force a defendant to choose between surrendering a valid Fourth Amendment claim or waiving his Fifth Amendment privilege. However, *Simmons* has no application to this case because nothing comparable is involved in the present non-criminal proceeding.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

SUPREME COURT, U. S

FILED

JUN 6 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1014

ARTHUR MEISTER and DOROTHY MEISTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1974.

—

No. 74-1014.

—

ARTHUR MEISTER AND DOROTHY MEISTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

—

PETITION FOR REHEARING.

—

On May 12, 1975, the petition for a writ of certiorari in this case was denied. Petitioners move this Court to reconsider and reverse or modify that decision upon the following grounds:

1. In an attempt to simplify the issues presented in his memorandum opposing issuance of the writ, the Solicitor General focussed attention at such a general level that the fabric of established law was made to appear whole where, in fact, the decision below is discontinuous with accepted legal principles in at least two substantial areas which demand attention and resolution by this Court.

a. In his Memorandum in Opposition, the Solicitor General relied on the holding in **Burdeau v. McDowell,** 256 U. S. 465 (1921), that the exclusionary rule does not preclude the government's use of unlawfully seized evidence when the government had no complicity in its unlawful seizure. However, this is merely to state a legal truism which, contrary to the Solicitor General's implied argument (Memorandum in Opposition, pp. 3-5), petitioners have never contested. The issue raised in this case is what constitutes government complicity; and it is submitted that the Court of Appeals for the Seventh Circuit properly defined that complicity in **Knoll Associates Inc. v. FTC,** 397 F. 2d 530 (1968), and that the Court of Appeals for the Third Circuit should have found complicity here on virtually identical facts,[1] where an employer's papers are stolen by his employee and voluntarily delivered to the government for no purpose other than to provide the government with evidence against the employer. It does not eliminate the conflict between this case and **Knoll** to say that the facts in **Knoll** are clearly distinguishable from those in **Burdeau,** since the facts in this case are also distinguishable from those in **Burdeau,** and on precisely the same grounds. Whereas the incriminating evidence sought to be used in **Burdeau** was discovered only incidentally in the course of a search undertaken by private persons for purely private purposes, both in **Knoll** and in this case, the private searchers were motivated by the sole purpose of discovering usable evidence. Thus, the controlling precedent, relied upon

1. See original Petition at pp. 5-7, 14-15. The complicity of the government is, in fact, much more extensive in this case than it was in **Knoll** since, by its publicly announced and commonly known policy of rewarding informers, the Internal Revenue Service actually invited, and certainly could have foreseen, exactly the kind of private theft which occurred here. (See Petition at pp. 15-18.)

in **Knoll** but rejected here, is not **Burdeau**, but **Gambino v. United States**, 275 U. S. 310 (1927), decided by this Court six years after **Burdeau** and clearly intended to limit its application. The Solicitor General's footnote discussion of **Gambino** (Memorandum in Opposition, p. 6), hardly serves to distinguish that case, but only emphasizes the Solicitor General's failure to address the substantial Fourth Amendment issue raised here.

b. The records seized from petitioners and concededly crucial to the government's case were admitted over a hearsay objection on the grounds that they were identified by petitioners' agent in an independent proceeding to compel their return and suppression. Since such "identification" was a necessary condition to establish petitioners' standing to assert the violation of their Fourth Amendment rights, the lower court's reliance upon that identification to admit incriminating evidence clearly put petitioners to the compelled choice of constitutional rights condemned by this Court in **Simmons v. United States**, 390 U. S. 377 (1968). Once again, the Solicitor General's failure to meet this argument obscured the substantial issue raised. It is clearly not enough for him summarily to conclude that "nothing comparable is involved in the present non-criminal proceeding," (Memorandum in Opposition, p. 7), when this distinction has not prevented this Court and others from holding both Fourth and Fifth Amendment protections available to the civil defendant in a variety of proceedings, including those for the recovery of penalties for tax fraud (See cases cited in Petition at nn. 12, 13 at pp. 25-26).

2. A "legitimate expectation of privacy" is the cornerstone of both Fourth and Fifth Amendment rights. Petitioners here were shown to have such a legitimate expectation of privacy with respect to husband-petitioner's tax

records which were stored in a safe on his business premises and entrusted to his full-time employee only for work on those premises. (See Petition at pp. 18-22.) In **Couch v. United States,** 409 U. S. 322 (1973), this Court explicitly recognized such factors as evidencing "constructive possession" of personal papers and, thus, preserving the Fifth Amendment privilege which ordinarily depends upon actual possession. Nonetheless, the lower court relied upon **Couch** to negate petitioner's claim that his Fifth Amendment rights were not extinguished by the removal of his papers from his offices without his authorization or consent.

This Court has granted petitions for certiorari and consolidated appeals in two cases [2] which deal with this precise question left open by **Couch,** *i.e.,* the extent to which a taxpayer has a legitimate expectation of privacy with regard to his personal business records and may claim a Fifth Amendment privilege to bar their use in evidence against him even though they were obtained by the government from persons other than the taxpayer. Although these cases (**Kasmir** and **Fisher**), involve a transfer of records between client and attorney, the fundamental question is not one of privilege, but whether the taxpayer had a legitimate expectation of privacy and retained constructive possession of his papers within the meaning of **Couch.** This is, of course, the very question involved here; and this Court's resolution of that question could well be determinative of the Fifth Amendment claim in this case and may, further, shed considerable light on the related Fourth Amendment issue. It is urged, therefore, that even if this Court will not now grant the petition for a writ of certiorari, it should reserve final

2. **United States v. Kasmir,** 499 F. 2d 444 (5th Cir. 1974), and **United States v. Fisher,** 500 F. 2d 683 (3d Cir. 1974), *cert. granted,* 43 U. S. L. W. 3416 (Jan. 27, 1975).

determination pending its decision in **Kasmir** and **Fisher** for the limited purpose of retaining the power to remand this case to the Third Circuit, should that be appropriate in light of that decision.

For all the above reasons, it is respectfully requested that this Court either reverse its order denying the petition for a writ of certiorari or, at least, reserve final determination pending its decision in **Kasmir** and **Fisher.**

Respectfully submitted,

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Dated: June 6, 1975.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is being filed in good faith and not for purposes of delay and includes only such arguments as are in accordance with Rule 58(2) of the Rules of the Supreme Court of the United States.

JAMES D. CRAWFORD,
Attorney for Petitioner.

Dated: June 6, 1975.